buyers. *See* the discussion of legislative history *supra*; *see also, e.g.*, William E. Rosales, *Dethroning Economic Kings: The Packers and Stockyards Act of 1921 and its Modern Awakening*, 2004 WIS. L. REV. 1497 (2004) (a scholarly history of the PSA). Thus, the Act promoted *social goals*, not only market efficiency.

Finally, several courts have recognized that the PSA's objectives extend beyond promoting market efficiency. In its first review of the Act, for example, this Court explained that the PSA sought not only to promote competition but also to protect the interests of small producers, stating:

> [The Act] forbids [packers] to engage in unfair, discriminatory, or deceptive practices in such commerce, or to subject any person to unreasonable prejudice therein, or to do any of a number of acts to control prices or establish a monopoly ....

Stafford v. Wallace, 258 U.S. 495, 513, 66 L. Ed. 735, 740 (1922). While noting the "chief evil" Congress sought to address through the Act was "the monopoly of the packers, enabling them unduly and arbitrarily to lower prices," the Court also noted "[a]nother evil" targeted by Congress. 258 U.S. at 514–15, 66 L. Ed. at 741. The other evil was unfair trade practices such as "exorbitant charges, duplication of commissions, [and] deceptive practices in respect to prices ...." *Id.* The Court explained that the imbalances in power between the packers and stockyards, on the one hand, and the owners and sellers of livestock, on the other, "create a situation full of opportunity and temptation, to the prejudice of the absent shipper and owner [of the livestock]." *Id.*

Other courts have echoed this reading. The Ninth Circuit found the PSA "was not intended merely to pre-

vent monopolistic practices, but also to protect the livestock market from unfair and deceptive business tactics." *Spencer Livestock Com'n Co. v. Dep't of Agriculture*, 841 F.2d 1451, 1455 (9th Cir. 1988). The Seventh Circuit saw the Act was designed to go beyond existing anti-trust statutes in effect at the time of its enactment, stating "the Act does not specify that a 'competitive injury' or a 'lessening of competition' or a 'tendency to monopoly' be proved in order to show a violation of the statutory language." *Wilson & Co., Inc. v. Benson*, 286 F.2d 891, 895 (7th Cir. 1961). That Court subsequently affirmed this understanding, stating further, "The Act is remedial legislation and is to be construed liberally in accord with its purpose to prevent economic harm to producers and consumers at the expense of middlemen." *Swift & Co. v. United States*, 393 F.2d 247, 253 (7th Cir. 1968). The Eighth Circuit has agreed: "... the purpose of the Act is to assure fair trade practices in the livestock marketing and meat-packing industry in order to safeguard farmers and ranchers against receiving less than the true market value of their livestock ...." *Bruhn's Freezer Meats of Chicago, Inc. v. U.S. Dep't of Agriculture*, 438 F.2d 1332, 1337 (8th Cir. 1971).

B. The Eleventh Circuit disregarded the PSA's important remedial objectives.

The Eleventh Circuit construed the PSA as a measure to promote maximum competition to the exclusion of other objectives. Thus, the defendant, Tyson Fresh Meats, the nation's largest meatpacker, was able to offer several self-serving reasons for its long-term marketing agreements, each of which assertedly served a valid business purpose and competitive objective. The Eleventh Circuit stated:

> If there is evidence from w[illegible]ch a jury reasonably could find that none of Tyson's as-

> serted justifications are real, that each one is pretextual, Pickett [the cattle producer] wins. Otherwise, Tyson wins.

Pickett v. Tyson Fresh Meats, Inc., 420 F.3d 1272, 1281 (11th Cir. 2005); Pet. App. at 14a. Put differently, any valid business justification[6] for the marketing agreements in issue would defeat Pickett's PSA relief, regardless of whether a less harmful or restrictive means of accomplishing the alleged justification might exist or could be found.[7] Under this framework, it was immaterial that the jury found (a) that Pickett's cattle were higher quality than the cattle from Tyson's captive source, yet (b) because of the long-term marketing agreements Pickett received a lower price. *Pickett*, 420 F.3d at 1276; Pet. App. at 24a. The Court found as a matter of law that this would not be probative of unfair or manipulative behavior proscribed by the PSA.

This Court should reaffirm the PSA's original objectives as described in subpart I-A, above. And it is criti-

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[6] The Circuit Court used the term "pro-competitive justifications," (*Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272, 1279 (11th Cir. 2005); Pet. App. at 11a), while the District Court used the term, "business justifications" (*Pickett v. Tyson Fresh Meats, Inc.*, 315 F.Supp.2d 1172, 1175 (M.D.Ala. 2004)). Here we use the District Court's terminology.

[7] In contrast to the Eleventh Circuit's approach here, this Court has stated, in an antitrust context, that, in considering whether business conduct is impermissible, "it is relevant to consider its impact on consumers and *whether it has impaired competition in an unnecessarily restrictive way*." *Aspen Skiing Co. v. Aspen Highlands Skiing*, 472 U.S. 585, 605 (1985) (emphasis added). Here, the lower Court did not consider whether Tyson's challenged marketing arrangements were the least anticompetitive method of achieving their allegedly legitimate business objectives.

cal that it do so now. As the Eleventh Circuit observed, industry practices have undergone changes in the "last decade or so" (*Pickett*, 420 F.3d at 1275; Pet. App. at 4a). These changes place small cattle producers (including many *amici* members) at the mercy of very large packers. As the Eleventh Circuit explained, before the advent of the long-term agreements, "packers purchased cattle almost exclusively through the cash market," *id.*, but now they utilize captive sources and effectively manipulate market prices to the injury of small producers, as the jury found below. Therefore, unless this Court re-affirms the PSA's true objectives, the industry may revert to the pattern existing in 1921 when Congress enacted the PSA.

II. IN ANY CASE, THIS COURT SHOULD RESOLVE A SPLIT IN THE CIRCUITS AND CLARIFY THE STANDARD FOR PSA VIOLATIONS.

The Eleventh Circuit's decision to require a showing of absolute anti-competitive impact to establish a PSA violation conflicts not only with the remedial purpose of the Act, as described in subpart I-A, above, but also with specific interpretations other Circuits have given the Act. Indeed, the Eleventh Circuit, itself, noted this split, *see below*.

The Eleventh Circuit ruled below that a plaintiff must show that a defendant's conduct was absolutely anti-competitive to establish a PSA violation. Thus, any business justification for challenged business behavior would constitute a "saving grace" and defeat a plaintiff's claim for relief. Thus, the Eleventh Circuit held that the Act "requires a plaintiff to show an adverse effect on competition," with regard to both unfair practice claims under section 202(a) of the Act (7 U.S.C. § 192(a)) and price manipulation claims under section 202(e) of the Act (7 U.S.C. § 192(e)). *Pickett*, 420 F.3d at 1280; Pet. App. at

12a. The Court cited its earlier holding in *London v. Fieldale, infra,* with regard to unfair practice claims to support this conclusion. *Id.*

London is particularly important for purposes of the petition in the instant case. There, the Eleventh Circuit itself acknowledged that its decision to require a showing of anti-competitive impact was a matter of some dispute among the Circuits. *London v. Fieldale Farms Corp.*, 410 F.3d 1295, 1303 (11th Cir. 2005), *cert. denied*, 126 S. Ct. 752, 163 L. Ed. 2d 574 (2005). For example, the *London* Court noted its disagreement with the Ninth Circuit (*id.*), which gave the Act a far different construction in *Spencer Livestock Com'n Co. v. Dep't of Agriculture*, 841 F.2d 1451 (9th Cir. 1988). In *Spencer*, the Court characterized the position of the petitioners therein as one in which the PSA was "nothing more than a mirror of the antitrust laws." 841 F.2d at 1455. The Court categorically rejected the position, stating:

> This argument relies on an incomplete understanding of the objectives of the Act [*i.e.*, PSA]. The primary purpose of the Act was "to assure fair competition and *fair trade practices* in livestock marketing...." H.R.Rep. No. 1048, 85th Cong., 2d Sess., *reprinted in* 1958 U.S. Code Cong. & Admin. News 5212, 5213 ([Court's] emphasis added). It was not intended merely to prevent monopolistic practices, but also to protect the livestock market from unfair and deceptive business tactics.

Id. *Spencer* therefore ruled as follows:

> {W]e uphold a finding of a § 213 violation where the evidence establishes a deceptive

> practice, *whether or not it harmed consumers or competitors.* [Emphasis added.]

Id. The subject of *Spencer* was section 213 of the PSA proscribing deceptive practices. However, the Ninth Circuit's rationale (based on the purposes of the PSA as reflected in legislative history) logically applies as well to section 202 provisions proscribing unfair practices and price manipulation, the PSA provisions at issue in this case.

The *London* Court cited other Circuits in support of its conclusion. *London*, 410 F.3d at 1303. However, these other Courts have not been uniform in their interpretations of the Act, and none have applied the *Pickett* rule that any business justification can defeat a PSA claim, including a price manipulation claim under section 202(e).

Thus, the Eighth Circuit relied on a claimant's failure to show competitive injury when it found no violation of section 202(a) of the PSA in *IBP, Inc. v. Glickman*, 187 F.3d 974 (8th Cir. 1999). But, in that case, all parties agreed there was no lowering of prices to producers nor was price manipulation alleged under section 202(e), a difference not addressed in *Pickett*. This difference is particularly significant given the Eighth Circuit's previous recognition that the PSA was designed "to safeguard farmers and ranchers against receiving less than the true market value of their livestock." *Bruhn's Freezer Meats*, 438 F.2d at 1337.

The Seventh Circuit, also cited as supportive in *London* (410 F.3d at 1303), has additionally issued interpretations varying somewhat from the Eleventh Circuit's. Pointing to the PSA's legislative history and to its own previous decisions, the Seventh Circuit said: "Section 202(a) of the Act does not require the Government to

prove injury to competition." *Swift*, 393 F.2d at 253, citing *Wilson*.

The Eleventh Circuit particularly relied on *Armour & Co. v. United States*, 402 F.2d 712 (7th Cir. 1968), to support its position that all section 202(a) violations require a showing of anti-competitive impact. *See London*, 410 F.3d at 1303. However, the Seventh Circuit handed down *Armour* just six months after *Swift*, discussed above, and *Armour* observed: "[w]hile Section 202(a) of the Packers and Stockyards Act may be broader than antecedent antitrust legislation," it does not allow:

> ... condemning practices which are neither deceptive nor injurious to competition nor intended to be so .... Even if predatory intent is absent, Armour's coupon program might violate Section 202(a) if it would probably result in competitive injury, tend to restrain trade or create a monopoly.

Armour, 402 F.2d at 722. The Eleventh Circuit relies on *Armour* without accounting for the *Armour* Court's careful statements that a practice may violate the PSA if it is either injurious to competition or deceptive, and if there is either competitive injury or a restraint to trade.

Thus, the Eleventh Circuit's holding here lies at the outer edge of the varying interpretations offered by the various Circuits construing the PSA. While some Circuits find the PSA prohibits unfair, deceptive, and manipulative practices regardless of anti-competitive effect, others state the Act only prohibits those practices which can be shown to injure competition. The Eleventh Circuit appears to go further still by requiring the anti-competitive effect to be absolute, with no business justifications.

The law should be clear for all. It should put packers on notice as to the threshold of potential liability and it should clarify for cattle producers when they can obtain relief. The resolution of this conflict is central to the scope and effectiveness of the Act. Claims under the PSA should succeed or fail based on their merits under the law as intended by Congress, not based on the court in which they happen to be heard. Accordingly, this Court should review the instant case to clarify the PSA's meaning.

III. THE NATIONAL SCOPE OF THE INDUSTRY UNDERSCORES THE IMPORTANCE OF REVIEWING THIS CASE.

Conflict among the Circuits regarding the PSA's meaning is particularly harmful in this case, where fulfillment of the Act's remedial objectives depends on clear national standards. The livestock and meatpacking industry is national in scope, as are the instant *amici*. At the same time, the PSA was specifically designed to provide for nation-wide regulation. This Court stated in *Stafford*:

> The act ... treats the various stockyards of the country as great national public utilities to promote the flow of commerce from the ranges and farms of the West to the consumers in the East. It assumes that they conduct a business affected by a public use of a national character and subject to national regulation.

258 U.S. at 516, 66 L. Ed. at 741. In fact, today, hundreds of thousands of small, independent cattle producers all across the country, including those who are members of *amici*, sell to an industry increasingly concentrated in

the hands of four large packing companies.[8] This concentration among packers approaches and may even exceed the level of concentration in 1921. Indeed, the four largest beef packing companies control more than 80 percent of steer and heifer slaughter.[9] Contracting practices employed by those packers affect cattle producers from Washington State to Florida. Courts should apply the law to these practices with consistency and predictability.

In addition to being national in scope, this case is also of national importance. The defendant, Tyson Fresh Meats, processes up to forty percent of the beef products sold nationwide. *See Pickett,* 420 F.3d at 1274; Pet. App. at 1a–2a. Tyson also plays a dominant role in the cattle slaughter market, purchasing 10 million of the 25 million cattle slaughtered each year. *See Pickett,* 420 F.3d at 1276-77; Pet. App. at 6a. The contract practices now in issue were used in twenty to fifty percent of all of Tyson's cattle purchases between 1994 and 2002. *See Pickett,* 420 F.3d at 1276 fn.1; Pet. App. at 4a, fn. 1. Moreover, this form of contracting developed relatively recently, and its use in the industry grew rapidly over the 1980s and 1990s. *See Pickett,* 420 F.3d at 1275-76; Pet. App. at 4a. During the same period, packer concentration has increased and the cattle producers' share of each retail dollar for beef has fallen.[10]

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[8] *See, e.g.*, J. MacDonald, et al., "Consolidation in U.S. Meatpacking," Agricultural Economic Report No. 785, Food and Rural Economics Division, Economic Research Service, U.S. Department of Agriculture (2000).

[9] U.S. General Accounting Office, "Packers and Stockyards Programs: Actions Needed to Improve Investigations of Competitive Practices," GAO/RCED-00-242 (2000) at 31.

[10] The rancher's share of each retail dollar earned on beef was 45 cents in 2004, down from 56 cents in 1993. USDA Economic Research Service, "Beef Values and Price Spreads,"

This Court has never addressed these new business practices, and thus the issue presented is one of first impression for this Court. In drafting the PSA, Congress recogni[illegible] the need for the Act to be open to judicial interpret[illegible] so that future practices by powerful packers could be scrutinized and remedied if necessary.[11] Ironically, this very openness is now being used to undermine the purposes for which the Act was enacted. The Eleventh Circuit has given a narrow construction to the Act's intentionally flexible terms and curtailed the relief the Act can provide.

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available on-line at: http://www.ers.usda.gov/briefing/foodpricespreads/meatpricespreads/.

[11] Congressman Anderson observed during the House debates on the PSA:

> Industry is progressive. The methods of industry and of manufacture and distribution change from day to day, and no positive iron-clad rule of law can be written upon the statute books which will keep pace with the progress of the industry. So we have not sought to write into this bill arbitrary and iron-clad rules of law. We have rather chosen to lay down certain more or less definite rules, rules which are sufficiently flexible to enable the administrative authority to keep pace with the changes of methods in distribution and manufacture and in industry in the country.
>
> * * * * *
>
> As I said the other day, business is progressive, and there must be a certain amount of flexibility in the prohibitions in order that the prohibitions may keep up with the progress of industry.

61 Cong. Rec. 1887 (May 27, 1921), 1920 (May 31, 1921).

Accordingly, this Court should reaffirm the PSA's founding objectives and provide guidance to the lower courts on how to interpret the Act consistently on a nation-wide basis. Otherwise, the gross imbalances in bargaining power and abuses of that power that prompted the enactment of the PSA in 1921 may re-emerge with no remedy available to those very cattle producers whose interests the PSA was designed to protect.

CONCLUSION

This case presents important issues arising under a federal statute that impacts the nation as a whole. It also represents an issue on which the Circuit Courts disagree. Accordingly, for all of the reasons set forth above, this Court should grant a *writ of certiorari*.

Respectfully submitted,

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